AZIZAN SAAD

v.

PP

HIGH COURT MALAYA, TEMERLOH
NIK HASHIM J
[CRIMINAL REVISION NO: 43-01-2000]
25 FEBRUARY 2000

CRIMINAL PROCEDURE: *Revision - Warrant of commitment - Validity - Direction - Sentence of imprisonment to run consecutively to previous sentence - Trial judge did not say so in open court nor record it in judgment notes - Whether sentence of imprisonment to run from date sentence was passed in open court - Whether trial judge became functus officio after sentence was passed in open court - Whether warrant of commitment should be consistent with direction passed in open court - Whether irregularity curable under s. 422 Criminal Procedure Code*

WORDS AND PHRASES: *"direct" - Criminal Procedure Code, ss. 282(d), 292(i) - Implication thereof - Whether direction must be made in open court and recorded in judgment notes*

The accused was convicted and sentenced to 12 months' imprisonment under s. 12(3) of the Dangerous Drugs Act 1952. On the warrant of commitment ('WC'), the trial judge directed that the sentence of imprisonment was to run consecutively to the previous sentence of the accused, *ie*, after the expiration of the 42 months' imprisonment. However, the trial judge did not direct as such in open court nor did the learned judge record it in her judgment notes. The issue was whether the WC was valid in the circumstances.

Held:

[1] The relevant provisions relating to the commencement of sentence of imprisonment are ss. 282(d) and 292 of the Criminal Procedure Code. The phrases "unless the court passing sentence otherwise directs" under s. 282(d) and "as the court awarding the sentence may direct" under s. 292(i) are similar in effect in that unless the sentencing court otherwise directs, every sentence of imprisonment shall commence immediately, *ie*, on the same date on which the sentence was passed. So the court in suitable cases may direct that the present term of imprisonment takes effect at the expiration of the imprisonment to which the accused has been previously sentenced.

[1a] The word "direct" in both sections implies that the direction, if made, must be made and declared in the open court in the presence and hearing of the parties in the proceeding and the court making the direction must record it clearly in the judgment notes. Any direction made outside the judgment notes is not a direction made in accordance with the sections and is therefore invalid and unenforceable in law.

[2] The WC is a committing document empowering the prison authorities to receive and imprison the accused person. It is therefore very important to ensure that the entries in the WC are not inconsistent with the sentence passed.

[3] The learned judge became *functus officio* after the sentence was passed. Unless it was a clerical error which might be rectified, she could not add or alter her judgment (s. 278 CPC). If she really intended at the time of passing the sentence that the sentence of imprisonment was to run consecutively, then she must say so in open court and express it clearly in her judgment notes. Otherwise, the sentence of imprisonment ran from the date on which the sentence was passed. Though the WC was signed by her, the direction on the WC was not part of her judgment when she passed the sentence in court.

[4] The omission was not a mere irregularity but one that had occasioned a failure of justice to the detriment of the accused which was not curable under s. 422 of the CPC. The direction on the WC had no legal basis and as such it should be set aside.

[The WC be cancelled and a new one issued minus direction. The accused to serve 12 months' imprisonment from date of sentence.]

Legislation referred to:
Criminal Procedure Code, ss. 278, 282(d), 292(i), 422
Dangerous Drugs Act 1952, s. 12(2), (3)

For the accused - Richard Bong, M/s Bong & Co
For the PP - Iskandar Ali Dewa; DPP

Reported by Usha Thiagarajah

JUDGMENT

Nik Hashim J:

Following his guilty plea, the accused person was convicted for an offence of having in his possession 0.50 grammes of heroin under s. 12(2) of the Dangerous Drugs Act 1952 (the Act) and was sentenced on 22 December 1999 to 12 months imprisonment under s. 12(3) of the same Act. The learned

Sessions Court Judge, sitting as a magistrate, however, directed on the warrant of commitment (the WC) that the sentence of imprisonment was to take effect after the expiration of the 42 months imprisonment imposed on 18 November 1999 *vide* Kuala Lumpur case no. D.81-39-99. The WC, which was signed by the learned judge, bore the following direction note at the top of the warrant:

HUKUMAN BERJALAN SELEPAS MENJALANI

HUKUMAN PENJARA BAGI KES

D81-39-99-sek. 12(2) ADB 1952 – Kuala Lumpur

Dissatisfied with the direction on the WC, the learned counsel who represented the accused before the learned judge, applied to this court to revise the direction on the ground that it was not valid as it was not pronounced and recorded in the notes of the learned judge during the proceeding in the open court.

The learned deputy public prosecutor, on the other hand, contended that the direction was valid. He contended that the failure on the part of the learned judge to state the direction in the proceeding notes and to pronounce it in the open court was only an omission which occasioned no failure of justice and hence curable under s. 422 of the Criminal Procedure Code (FMS Cap 6) (the CPC).

The issue in this case is whether the direction on the WC is valid in the circumstances.

The relevant provisions relating to the commencement of sentence of imprisonment are as follows:

Section 282(d) of the CPC states:

> every sentence of imprisonment shall take effect from the date on which the same was passed **unless the court passing sentence otherwise directs**.

whereas s. 292(i) says:

> When a person ... is undergoing a sentence of imprisonment is sentenced to imprisonment, such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, **as the court awarding the sentence may direct ...**
>
> (emphasis added).

The phrases **"unless the court passing sentence otherwise directs"** under s. 282(d) and **"as the court awarding the sentence may direct"** under s. 292(i) of the CPC are similar in effect in that, unless the sentencing court otherwise directs, every sentence of imprisonment shall commence immediately *ie*, on the same date on which the sentence was passed. So, the court in suitable cases may direct that the present term of imprisonment to take effect at the expiration of the imprisonment to which the accused has been previously sentenced. In my view, the word **'direct'** in both sections implies that the direction, if made, must be made and declared in the open court in the presence and hearing of the parties in the proceeding, and the court making the direction must record it clearly in the judgment notes. Any direction made 'outside' the judgment notes is not a direction made in accordance with the sections, and therefore is invalid and unenforceable in law.

The WC is a committing document empowering the prison authorities to receive and imprison the accused person. It is therefore very important to ensure that the entries in the WC are not inconsistent with the sentence passed. In this case, there was no such direction like the one written on the WC was ever recorded in the judgment notes. What was stated in the judgment notes of the learned judge is that upon his plea of guilty and mitigation by counsel and the address by the prosecuting officer, the accused was only sentenced to 12 months imprisonment with no indication whatsoever that the sentence was to run consecutively to the 42 months imprisonment imposed by the Kuala Lumpur Court.

The learned judge is bound by her decision, and in the present case, she became *functus officio* after the sentence was passed. Unless it is a clerical error which may be rectified, which is not the case here, she cannot add or alter her judgment (see s. 278 of the CPC). If she really intends at the time of passing the sentence that the sentence of imprisonment is to run consecutively, then she has to say so in the open court and express it clearly in her judgment notes. Otherwise, the sentence of imprisonment runs from the date on which the sentence was passed. Thus, the learned judge cannot make the order on the WC directing the accused person to serve the present term of imprisonment consecutively to the one he has been previously sentenced. Though the WC was signed by her, the direction on the WC is not part of her judgment when she passed the sentence in court.

If indeed the failure of the learned judge to state the direction in her judgment notes amounts to an omission, as contended by the learned Deputy Public Prosecutor, then the omission, to my mind, is not a mere irregularity but an omission which has occasioned a failure of justice to the detriment of the accused which is not curable under s. 422 of the CPC. The direction on the WC has no legal basis and as such, it should be set aside.

Therefore, on revision, I ordered that the WC be cancelled and a new one be issued instead minus the direction. The accused person is to serve the 12 months imprisonment from 22 December 1999, the date on which the sentence was passed.